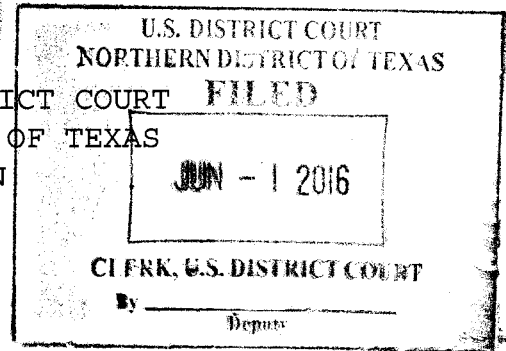


IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION



TYLER RAYLEN COLBERT,
Petitioner,

V.

LORIE DAVIS, Director,¹
Texas Department of Criminal
Justice, Correctional
Institutions Division,

Respondent .

101
 102
 103
 104
 105
 106
 107
 108
 109
 110
 111
 112
 113
 114
 115
 116
 117
 118
 119
 120
 121
 122
 123
 124
 125
 126
 127
 128
 129
 130
 131
 132
 133
 134
 135
 136
 137
 138
 139
 140
 141
 142
 143
 144
 145
 146
 147
 148
 149
 150
 151
 152
 153
 154
 155
 156
 157
 158
 159
 160
 161
 162
 163
 164
 165
 166
 167
 168
 169
 170
 171
 172
 173
 174
 175
 176
 177
 178
 179
 180
 181
 182
 183
 184
 185
 186
 187
 188
 189
 190
 191
 192
 193
 194
 195
 196
 197
 198
 199
 200
 201
 202
 203
 204
 205
 206
 207
 208
 209
 210
 211
 212
 213
 214
 215
 216
 217
 218
 219
 220
 221
 222
 223
 224
 225
 226
 227
 228
 229
 230
 231
 232
 233
 234
 235
 236
 237
 238
 239
 240
 241
 242
 243
 244
 245
 246
 247
 248
 249
 250
 251
 252
 253
 254
 255
 256
 257
 258
 259
 260
 261
 262
 263
 264
 265
 266
 267
 268
 269
 270
 271
 272
 273
 274
 275
 276
 277
 278
 279
 280
 281
 282
 283
 284
 285
 286
 287
 288
 289
 290
 291
 292
 293
 294
 295
 296
 297
 298
 299
 300
 301
 302
 303
 304
 305
 306
 307
 308
 309
 310
 311
 312
 313
 314
 315
 316
 317
 318
 319
 320
 321
 322
 323
 324
 325
 326
 327
 328
 329
 330
 331
 332
 333
 334
 335
 336
 337
 338
 339
 340
 341
 342
 343
 344
 345
 346
 347
 348
 349
 350
 351
 352
 353
 354
 355
 356
 357
 358
 359
 360
 361
 362
 363
 364
 365
 366
 367
 368
 369
 370
 371
 372
 373
 374
 375
 376
 377
 378
 379
 380
 381
 382
 383
 384
 385
 386
 387
 388
 389
 390
 391
 392
 393
 394
 395
 396
 397
 398
 399
 400
 401
 402
 403
 404
 405
 406
 407
 408
 409
 410
 411
 412
 413
 414
 415
 416
 417
 418
 419
 420
 421
 422
 423
 424
 425
 426
 427
 428
 429
 430
 431
 432
 433
 434
 435
 436
 437
 438
 439
 440
 441
 442
 443
 444
 445
 446
 447
 448
 449
 450
 451
 452
 453
 454
 455
 456
 457
 458
 459
 460
 461
 462
 463
 464
 465
 466
 467
 468
 469
 470
 471
 472
 473
 474
 475
 476
 477
 478
 479
 480
 481
 482
 483
 484
 485
 486
 487
 488
 489
 490
 491
 492
 493
 494
 495
 496
 497
 498
 499
 500
 501
 502
 503
 504
 505
 506
 507
 508
 509
 510
 511
 512
 513
 514
 515
 516
 517
 518
 519
 520
 521
 522
 523
 524
 525
 526
 527
 528
 529
 530
 531
 532
 533
 534
 535
 536
 537
 538
 539
 540
 541
 542
 543
 544
 545
 546
 547
 548
 549
 550
 551
 552
 553
 554
 555
 556
 557
 558
 559
 560
 561
 562
 563
 564
 565
 566
 567
 568
 569
 570
 571
 572
 573
 574
 575
 576
 577
 578
 579
 580
 581
 582
 583
 584
 585
 586
 587
 588
 589
 590
 591
 592
 593
 594
 595
 596
 597
 598
 599
 600
 601
 602
 603
 604
 605
 606
 607
 608
 609
 610
 611
 612

No. 4:15-CV-070-A

MEMORANDUM OPINION
and
ORDER

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by petitioner, Tyler Raylen Colbert, a state prisoner incarcerated in the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ), against Lorie Davis, director of TDCJ, respondent. After having considered the pleadings, state court records, and relief sought by petitioner, the court has concluded that the petition should be dismissed as time-barred, in part, and for failure to exhaust, in part.

I. FACTUAL AND PROCEDURAL HISTORY

On June 6, 2012, in Tarrant County, Texas, pursuant to plea

¹Effective May 4, 2016, Lorie Davis replaced Williams Stephens as director of the Correctional Institutions Division of the Texas Department of Criminal Justice. Pursuant to Federal Rule of Civil Procedure 25(d), Davis is automatically substituted as the party of record.

bargain agreements, petitioner pleaded guilty to aggravated robbery and burglary of a habitation in Case Nos. 1247397D and 1272792D, and was placed on ten years' deferred adjudication community supervision and fined \$1,000 in each case. Adm. R., Clerk's Rs. 26 & 22, ECF Nos. 8-10 & 8-11. Petitioner did not appeal the orders of deferred adjudication; therefore, they became final under state law thirty days later on July 6, 2012. TEX. R. APP. P. 26.2(a)(1); *Manuel v. Texas*, 994 S.W.2d 658, 661-62 (Tex. Crim. App. 1999). The state later moved to adjudicate petitioner's guilt, alleging various violations of his community supervision. Adm. R., Clerk's Rs. 38, ECF No. 8-10 & 34, ECF No. 8-11. On August 8, 2013, after a hearing, the trial court adjudicated petitioner's guilt on both charges and sentenced him to 20 years' confinement for aggravated robbery and 10 years' confinement for burglary of a habitation. *Id.* at 45, ECF No. 8-10 & 41, ECF No. 8-11. Petitioner appealed the adjudication judgments, but the Second District Court of Appeals of Texas affirmed the judgments on March 27, 2014. *Id.*, J. & Mem. Op. 10, ECF No. 8-5. Petitioner did not file a petition(s) for discretionary review in the Texas Court of Criminal Appeals. Therefore, the judgments became final thirty-two days later on Monday, April 28, 2014. TEX. R. APP. P. 68.2(a); *Roberts v.*

Cockrell, 319 F.3d 690, 694 (5th Cir. 2003). Petitioner also filed a state habeas application challenging the guilty plea and adjudication proceedings on November 1, 2014, which was dismissed on December 17, 2014, for noncompliance with Texas's form requirements under Rule 73 of the Texas Rules of Appellate Procedure.² Adm. R., ECF No. 8-14 & ECF No. 81-6. This federal petition was filed on January 29, 2015.³

II. ISSUES

Petitioner raises the following grounds for habeas relief:

(1) and (2) The trial court abused its discretion by finding the burglary allegation in the third paragraph in the state's amended petitions to proceed to adjudication of guilt to be true;

(3) There was a fatal variance between the proof and the indictment and, in violation of double jeopardy, he was indicted for both burglary of a habitation of a disabled person and robbery of that same disabled person based on the same evidence; and

²Petitioner's state habeas application is deemed filed when placed in the prison mailing system. *Richards v. Thaler*, 710 F.3d 573, 578-79 (5th Cir. 2013). The application does not provide the date petitioner placed the document in the prison mailing system, however the "Inmate's Declaration" reflects that petitioner signed the document on November 1, 2014. For purposes of this opinion, petitioner's state habeas application is deemed filed on that date.

³Similarly, petitioner's federal habeas petition is deemed filed when placed in the prison mailing system. *Spotville v. Cain*, 149 F.3d 374, 377 (5th Cir. 1998). However, petitioner does not indicate the date he placed the document in the prison mailing system or the date he signed the document. Thus, petitioner is not given the benefit of the prison mailbox rule as to his federal petition.

(4) He received ineffective assistance of counsel during the original plea proceedings rendering his plea involuntary.

Pet. 6-7, ECF No. 1.

III. RULE 5 STATEMENT

Respondent believes that petitioner's claims are time-barred, in part, and wholly unexhausted. Resp't's Prel. Resp.4-11, ECF No. 9.

IV. STATUTE OF LIMITATIONS

Respondent asserts that petitioner's third and fourth grounds are time-barred. Title 28 U.S.C. § 2244(d) imposes a one-year statute of limitations for filing a petition for federal habeas corpus relief. 28 U.S.C. § 2244(d). Section 2244(d) provides:

(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of-

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

Id. § 2244(d)(1)-(2).

Petitioner's grounds three and four involve matters discoverable or occurring before or during the original plea proceedings. As to those claims, the one-year limitations period began to run on the date the orders of deferred adjudication became final upon expiration of the time that petitioner had for filing a notice(s) of appeal on July 6, 2012, and expired one year later on July 6, 2013, absent any applicable tolling. *Id.* § 2244(d)(1)(A); *Caldwell v. Dretke*, 429 F.3d 521, 530 (5th Cir. 2005); *Flanagan v. Johnson*, 154 F.3d 196, 200-02 (5th Cir. 1998).

For purposes of statutory tolling, petitioner's state habeas application filed after limitations had already expired did not

operate to toll the limitations period.⁴ *Scott v. Johnson*, 227 F.3d 260, 263 (5th Cir. 2000). Nor has petitioner demonstrated that he is entitled to equitable tolling. Equitable tolling is permitted only in rare and exceptional circumstances when an extraordinary factor beyond a petitioner's control prevents him from filing in a timely manner or he can make a convincing showing that he is actually innocent of the crime(s) for which he was convicted. *McQuiggin v. Perkins*, - U.S. -, 133 S. Ct. 1924, 1928 (2013); *Holland v. Florida*, 560 U.S. 631, 649 (2010). Petitioner makes no such showing. "Equity is not intended for those who sleep on their rights." *Fisher v. Johnson*, 174 F.3d 710, 715 (5th Cir. 1999). Thus, the petition is time-barred as to petitioner's third and fourth grounds.

V. EXHAUSTION

Respondent also asserts that all of petitioner's grounds are unexhausted. As grounds three and four are time-barred, the court addresses the exhaustion issue only as to grounds one and two.

⁴Petitioner's state habeas application was dismissed for noncompliance with the state's form requirements. Thus, even if it had been filed within the limitations period, it would not have operated to toll limitations. *Artuz v. Bennett*, 531 U.S. 4, 8-9 (2000); *Villegas v. Johnson*, 184 F.3d 467, 470 (5th Cir. 1999); *Davis v. Quarterman*, No. 4:07-CV-203-A, 2008 WL 2002936, at *2 (N.D.Tex. May 8, 2008), *aff'd*, 342 Fed. Appx. 952, 2009 WL 2710057 (5th Cir. 2009), *cert. denied*, 559 U.S. 1046 (2010).

Title 28 U.S.C. § 2254 provides, in relevant part:

(b) (1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that-

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B) (i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

. . . .

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

Id., § 2254(b) (1), (c).

It is well established that a prerequisite to federal habeas relief under § 2254 is the exhaustion of all claims through available state procedures prior to requesting federal collateral relief. *Id.*; *Picard v. Connor*, 404 U.S. 270, 275 (1971); *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998). The exhaustion requirement is satisfied by presenting the substance of the federal habeas claim to the highest court in the state via direct appeal or state habeas application. *Id.*; *Baxter v. Estelle*, 614 F.2d 1030, 1031-32 (5th Cir. 1980). Petitioner did not file a petition(s) for discretionary review nor has he

availed himself of the state postconviction habeas remedy for purposes of exhausting these claims. Thus, the claims are unexhausted for purposes of federal habeas review. Dismissal, without prejudice, of the claims is warranted so that petitioner may exhaust his state court remedy and return to this court, if he so desires, after exhaustion has been properly and fully accomplished.

The court is aware that the limitations period for filing a federal petition raising these claims expired on April 28, 2015, during the pendency of this federal habeas petition. The pendency of a federal proceeding does not provide a statutory basis for tolling the statute of limitations. *Duncan v. Walker*, 533 U.S. 167, 181 (2001). Therefore, a dismissal without prejudice may jeopardize petitioner's ability to seek a later review of the claims in federal court. Under these circumstances, a federal court has the discretion to either stay and abate or dismiss the action. *Brewer v. Johnson*, 139 F.3d 491, 493 (5th Cir.1998). Stay and abeyance should be granted only in limited circumstances when there is good cause for the failure to exhaust, the unexhausted claims are potentially meritorious, and there is no indication that the petitioner engaged in intentionally dilatory litigation tactics. *Rhines v. Weber*, 544 U.S. 269, 277 (2005). The court

finds no good cause excusing petitioner's failure to exhaust his state court remedies.

Petitioner claims that after he received notice of the appellate court's decision, he had only 10 days to file a petition(s) for discretionary review "and as a MHMR inmate with less than a highschool education then he did not have a fair chance to present a timely (P.D.R.) when Texas does not offer an attorney at that stage for its special inmates." Pet'r's Resp. 6, ECF No. 11. He further claims that the Texas Court of Criminal Appeals's dismissal of his state habeas application for failing to comply with rule 73 of the Texas Rules of Appellate Procedure was an abuse of discretion and a miscarriage of justice. *Id.* According to petitioner, he should not be "expected to live up to all the rules and procedures as a qualified competent attorney" given the complexity of the rules and procedures. *Id.* However, late notice of state court rulings, pro se status, and ignorance of the law and/or rules of court are common problems for inmates seeking postconviction habeas relief. See *McIntyre v. Quarterman*, No. 3:09-CV-0574-B, 2009 WL 1563516, at *2-3 (N.D.Tex. June 2, 2009). Further, petitioner provides no proof that mental illness or disease prevented him from exhausting his state remedies.

For the reasons discussed herein,

The court ORDERS that grounds one and two in the petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be, and are hereby, dismissed without prejudice for failure to exhaust state remedies and that grounds three and four be, and are hereby, dismissed as time-barred. The court further ORDERS that a certificate of appealability be, and is hereby, denied.

SIGNED June 1, 2016.



JOHN MCBRYDE

UNITED STATES DISTRICT JUDGE